SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 779

WILLIE GRAY GARRISON,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Court of Appeals of Alabama.

ROSCOE B. HOGAN,
1203 City Federal Building,
Birmingham, Alabama 35203,
Attorney for Petitioner.

Of Counsel:
HOGAN, WILDER & SMITH,
1203 City Federal Building,
Birmingham, Alabama 35203.

ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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STATE OF ALABAMA,
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PETITION FOR A WRIT OF CERTIORARI

To the Court of Appeals of Alabama.

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Alabama entered in this case on March 12, 1968.

OPINIONS BELOW.

The opinions below are as follows: Garrison v. State, ... Ala. App. ..., 213 So. 2nd 369. And Garrison v. State, ... Ala. ..., 213 So. 2nd 374. They are set forth in Appendices A and B respectively.

JURISDICTION.

The judgment of the Court of Appeals of Alabama was entered on March 12, 1968. A timely application for rehearing was denied on April 16, 1968. A timely petition

for a writ of certiorari to the Court of Appeals was filed in the Supreme Court of Alabama on May 1, 1968. A petition for a writ of certiorari to the Court of Appeals was denied by the Supreme Court of Alabama on July 18, 1968. A timely application for rehearing before the Alabama Supreme Court was denied on August 29, 1968. The jurisdiction of this Honorable Court is invoked under Section 1257 of Title 29, U. S. C.

QUESTION PRESENTED.

Whether a selection of the jury, jury roll and petit jury whereby citizens of the female sex were intentionally, arbitrarily, systematically and statutorially excluded from the grand and petit juries under the provisions of Title 30, Sections 20 and 21 of the Code of Alabama, 1940, as recompiled, 1958, was a denial to the petitioner of his rights under the due process clauses of the 5th and 14th Amendments and the equal protection of the laws guaranteed to him by the 14th Amendment to the Constitution of the United States of America?

CONSTITUTIONAL PROVISIONS AND STATUTES.

Fifth Amendment.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence (sic) to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, with (sic) just compensation.

Fourteenth Amendment.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 30, Section 20, Code of Alabama.

Jury roll and cards.—The jury commission shall meet in the court house at the county seat of the several counties annually, between the first day of August and twentieth day of December, and shall make in a well bound book a roll containing the name of every male citizen living in the county who possessed the qualifications herein prescribed and who is not exempt by law from serving on juries. The roll shall be arranged alphabetically and by precincts in their numerical order and the jury commission shall cause to be written on the roll opposite every name placed thereon the occupation, residence and place of business of every person selected, and if the residence has a street number it must be given. Upon the completion of the roll the jury commission shall cause to be prepared plain white cards all of the same size and texture and shall have written or printed on the cards the name, occupation, place of residence and place of business of the person whose name has been placed on the jury roll; writing or printing but one person's name, occupation, place of residence and of business on each card. These cards shall be placed in a substantial metal box provided with a lock and two keys, which box shall be kept in a safe or vault in the office of the probate judge, and if there be none in that office, the jury com-

mission shall deposit it in any safe or vault in the court house to be designated on the minutes of the commission; and one of said keys thereof shall be kept by the president of the jury commission. The other of said keys shall be kept by a judge of a court of record having juries, other than the probate or circuit court, and in counties having no such court then by the judge of the circuit court, for the sole use of the judges of the courts of said county needing jurors. The jury roll shall be kept securely and for the use of the jury commission exclusively. It shall not be inspected by anyone except the members of the commission or by the clerk of the commission upon the authority of the commission, unless under an order of the judge of the circuit court or other court of record having jurisdiction. (1939, p. 86; 1945, p. 496, appvd. July 7, 1945.)

Title 30, Section 21, Code of Alabama.

Qualification of persons on jury roll.—The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment; but no person must be selected who is under twenty-one or who is a habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror; or cannot read English or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder his name may be placed on the jury roll and in the jury box. No person over the age of sixty-five years shall be required to serve on a jury or to remain on the panel of jurors unless he is willing to do so. (1939, p. 86; 1943, p. 309, appvd. July 1, 1943.)

THE STATEMENT OF THE CASE.

The petitioner, Willie Gray Garrison, was indicted by the Grand Jury of Sumter County, Alabama on the 29th day of March, 1966. The indictment charged him with the crime of assault with intent to murder. Thereafter, the petitioner filed a motion to quash the indictment (See App. C). The motion to quash was overruled on May 4, 1966. A motion to quash the venire (See App. D) was entered to the effect that the jury was drawn according to law and that women were excluded.

The trial began on April 13, 1966 and was concluded on the 15th day of April, 1966 when the jury returned a verdict convicting the petitioner of assault with intent to murder as charged in the indictment. The Court sentenced the appellant to a term in the State penitentiary of seven years. The petitioner gave notice of appeal on the 18th day of April, 1966 and filed a motion for a new trial on the 13th day of May, 1966 which was overruled on September 26, 1966.

The Federal question sought to be reviewed was raised in the Court of first instance by the above mentioned motion to quash the indictment and the motion to quash the venire (Appendices C and D). It was raised by assignment of error on appeal and the Court of Appeals ruled upon the question as follows:

> "Appellant's contention that it was reversible error to deny his motions to quash the venire because of the systematic exclusion of women from the grand and petit juries of Sumter County is without merit. **Philpot v. State**, 43 Ala. App. 326, 197 So. 2d 293. This case was tried before the legislature amended the statute so as to provide for women serving in juries in Alabama."

ARGUMENT.

The holding of the Court of Appeals is in direct conflict with the case of **Ballard v. United States**, 329 U. S. 187, which involved a mail fraud prosecution of both a man and a woman. This Honorable Court dismissed the indictment because women were excluded from the Grand Jury.

CONCLUSION.

This petition for a writ of certiorari should be granted.

Respectfully submitted,

ROSCOE B. HOGAN,
1203 City Federal Building,
Birmingham, Alabama 35203,
Attorney for Petitioner.

Of Counsel:
HOGAN, WILDER & SMITH,
1203 City Federal Building,
Birmingham, Alabama 35203.

APPENDIX A.

Willie Gray Garrison,

v.

State.

2 Div. 171.

Court of Appeals of Alabama.

March 12, 1968.

Rehearing Denied April 16, 1968.

William Wayne Smith, Birmingham, for appellant.

MacDonald Gallion, Atty. Gen., and Robt. P. Bradley, Asst. Atty. Gen., for the State.

Price, Presiding Judge.

This appellant stands convicted of the offense of assault with intent to murder. His punishment was fixed at imprisonment for a term of seven years.

The state's evidence tends to show that on January 2, 1966, at about 11:00 a. m., M. D. King, a highway patrolman, while on routine patrol, came upon a car that was stopped on the road. He stopped and helped the two Negro men there move the car to the edge of the roadway and stayed there while they were fixing a flat tire.

During this time a brown 1958 Chrysler came by at a "pretty high speed," and the officer attempted to flag it down but it did not stop. He jumped in the patrol car and pursued the Chrysler. It stopped a short distance

away and he pulled the patrol car in behind the Chrysler, stopped and turned on his red light. The defendant was driving the car and there was a woman with him named Hazel Harper Robinson.

Officer King asked defendant for his driver's license and while he was getting it out of his billfold the Robinson woman said, "You know who this is, and you know damn well he's got a driver's license."

After the defendant handed the driver's license to him, Officer King asked him to open the trunk of his car. The woman said, "Shoot that S. O. B." The driver and his companion appeared to be in a drunken condition.

The woman handed defendant a pistol and he took it. As defendant "came around" with the pistol in his direction, Officer King dropped the driver's license in the Chrysler and ran around to the back of it. While doing so he noticed the back seat was out of the car and a rifle was lying on the floor board. As Officer King got in his car defendant appeared to be picking up the rifle.

The Chrysler then drove off and Officer King turned around and drove down the road. He then radioed Trooper Duck who was patrolling in the area to come to his assistance. Trooper Duck arrived shortly thereafter and Officer King got three shotgun shells from him to use in the shotgun King had in his car. Duck and King then separated and started looking for the Chrysler. While King was searching for the automobile he heard some shots. At about this time he saw the Chrysler sitting off the road up on a little hill. King said the shots were being fired in that area and the bullets were "whizzing" near him. King then called Duck to come to where he was. Before Duck got there the Chrysler came out of the woods behind a pulpwood truck and turned left toward Mississippi. King followed it, but not too closely. In a few minutes Duck

caught up to King and King got in Duck's car. They gave chase with the red light flashing. King testified he fired at the tires and the woman in the Chrysler returned the fire with a rifle. Shots were also coming from the driver's side of the car. Defendant was driving. After the exchange of shots the Chrysler increased its speed and so did the patrol car. At times the speed of the patrol car exceeded 100 miles per hour. All of the shooting just described took place in Sumter County, Alabama.

The chase continued into Mississippi where the patrol car lost the Chrysler near Whynot, Mississippi. They proceeded to the intersection of highway 19 and turned around there and went back toward Whynot. They passed a house and shots rang out from the direction of the house. A general alarm had been put out and in a few minutes several Mississippi law enforcement officers arrived and defendant came out to his mailbox, with a pistol in his belt. The woman who was in the Chrysler with defendant was standing there with a rifle.

For the defendant, Otto Robinson, a garage owner in the community where defendant lived, testified that on the Tuesday prior to January 2, 1966, he had occasion to work on defendant's 1958 brown Chrysler. Hazel Robinson came to the garage with defendant and picked up some spent shells for a 22 rifle and put them in a small box, along with some spent 38 caliber shells on the front floorboard of defendant's car. On January 2, 1966, between 11:15 and 11:30 A. M., defendant and Hazel Robinson were again in his shop; that defendant arrived from the direction of Alabama and left headed back in the direction of Alabama. He saw no bullet holes in defendant's automobile on either occasion.

James Sutter, a lifelong resident of the Whynot community, testified he was with the County Patrol of Lauderdale County, Mississippi; that he was familiar with

all the roads in the area and had been driving over them for twenty years; that the road on which the shooting was alleged to have occurred was part gravel and part dirt and was extremely curvy and dangerous; that a safe speed would not be more than 20 to 25 miles; that in his judgment the top speed that could be attained on that road would be 40 miles per hour.

Mrs. Charles Ivy testified she lived a mile west of defendant; that on January 2, 1966, two Alabama State Troopers came to her house and asked if she had seen defendant's brown Chrysler pass her house, that they were chasing him. She told them where defendant lived. She did not hear any shots from the direction of defendant's home prior to the arrival of the troopers.

Orange Ray testified he lived on the road in question in Sumter County; that between 11:00 and 12:00 noon on January 2, 1966, he saw defendant come down the highway in front of his house following a pulpwood truck driven by a Negro male; that defendant was driving at a slow rate of speed and he did not see any state trooper's automobile behind him.

Louis Brooks testified he lived on the Liberty Church road; that on January 2, 1966, his car was stalled on this road and a truck was pushing his car; that he heard something like a backfire and defendant's car passed him; that he heard several shots fired and he pulled to the side of the road. Bullets were flying everywhere and he lay down in the car. He saw the troopers fire one shot but didn't see any shots fired by defendant or Hazel Robinson and saw no weapons in the car. This shooting took place in Mississippi.

Curtis Hill testified he lived in Toomasuba, Mississippi; that on January 2, 1966, while he, Robert Curry and Willie Cleve Hill were traveling along the Bronson Road

in Sumter County, Alabama, they had a puncture on the right front tire of their automobile; that he pulled the car off on the side of the road and left his companions with the car while he started walking to his mother's house to get another tire; that after he was about fifty years (sic) down the road he saw Trooper King pull up behind his parked car and get out. Then he saw defendant come past his car and stop about 150 yards beyond it; that Trooper King went up to defendant's car, then went back and got in the patrol car, turned back down the road at a normal rate of speed; that defendant first started on down the road in the direction in which he had been traveling. However, after a short distance he also turned around and started in the opposite direction at a normal speed. The witness did not see defendant with a weapon, but the closest he got to him was about fifty yards.

Ollis Garrison testified he lived at Toomasuba, Mississippi, on the Bronson Road; that about 11:30 on the morning of January 2, 1966, he saw defendant pass his house following a pulpwood truck traveling at about 20 miles per hour. A few minutes later he saw a patrol car come by, but he heard no shooting along the highway.

James Fuller testified he lived along the Liberty Church Road about three miles west of the Alabama-Mississippi line. The road in front of his house is a straight stretch that extends about one-quarter of a mile and just east of his house is a steep hill with three sharp curves in it. At approximately 12:00 noon on January 2, 1966, he saw the defendant pass his house driving a 1958 brown Chrysler, followed by an Alabama state trooper's automobile; that he saw the troopers fire two shots into the rear end of defendant's automobile, but did not see any shots come from the Chrysler and didn't see any weapons in it. The cars were traveling 45 to 50 miles per hour and that rate

of speed is the fastest anyone could possibly travel the Liberty Church Road. A few minutes after defendant and the troopers passed he saw defendant's pulpwood truck pass his home, driven by a Negro man.

Parnell Willis, of Whynot, Mississippi, testified that on January 2, 1966, approximately 11:30 a. m., he went to defendant's house to wait for his wife, who was employed in defendant's home. The defendant arrived shortly thereafter and he and defendant put a battery and battery jumper cable in defendant's automobile and proceeded into Alabama to pick up a truck. When defendant arrived there were no bullet holes in his 1958 Chrysler. When they got to the Bronson Road the defendant pulled his car off onto an old logging road and they walked back into the woods to get defendant's pulpwood truck started with the jumper cable. After the truck was started he pulled it out into the road and started toward Mississippi with defendant following closely in his Chrysler; that defendant stayed behind the logging truck and never passed it until they were about a mile and a half inside the Mississippi line. At the time defendant passed him there was a car and a pickup truck directly in front of the truck he was driving. He was traveling about 25 miles per hour and defendant was traveling 35 to 40 miles per hour when he passed the truck. He stated he never saw defendant or Hazel Robinson shoot any weapons and he did not hear any shooting.

The defendant recalled Officer M. D. King for further cross-examination. He stated that from the Bronson Road to the intersection of Liberty Church Road he was shot at on two occasions; there were about three shots fired at him from the woods and defendant's car was stopped along the Bronson Road once and a shot was fired. Mr. Robinson fired one of the shots but he didn't see who fired the others.

Willie Gray Garrison, the defendant, testified he lived in the Whynot community, Lauderdale County, Mississippi; that he was in the logging business; that prior to Christman (sic) of 1965, he had left his truck on an old logging road just off the Bronson Road in Sumter County and the truck was parked a few hundred yards from where Trooper King stopped him on January 2, 1966. On that day he was going to get his truck and bring it back to Mississippi to get it ready for hauling logs the following Monday. Hazel Robinson went with him to drive the car back while he drove the truck. As he left home he traveled one mile east on old highway 19, turned left on the Whynot Old Town Road and proceeded due north until he turned east on the Liberty Church Road. He turned right on the Kinderbish Road and finally turned left on the Bronson Road and headed in a northerly direction. After he had traveled on the Bronson Road for about a miles (sic) and a half he saw a green automobile on the right side of the road. At this time he was slowing down to turn onto the old logging road and at that time he saw Trooper King flagging him to stop. He stopped and showed his driver's license to Trooper King and the officer then walked to the back of his car. Defendant asked where he was going with his driver's license, and the officer came to the driver's side and said. "I'm keeping the license until you get out and open the trunk." The witness stated, "Well I want my license." I said, "As far as me getting out and opening the trunk," I said, "I'm not going to get out and open it. All you have to do is push a button and it will open." I said "As far as my part, if you've got the right to look in there, all you've got to do is push a button." During this time Hazel Robinson was putting make-up on her face and dropped her compact on the front floor board of the automobile; that Trooper King started his patrol car and drove back to where the two Negroes were at the green automo-

bile. The defendant turned his car around and went back to the green car and had a short conversation with the Negroes; that defendant turned his car back around and went up to the logging road and parked his car off to the side of the road. The truck would not start and he started home to get a battery and jumper cable to start the truck. He stopped at Robinson's garage and had a conversation with Mr. Robinson concerning the truck. He then proceeded to his home in Mississippi and he and Parnell Willis put the jumper cable and battery in defendant's automobile and went back to the logging road in Alabama. It was about an hour from the first time he arrived at the logging road until he arrived back at the logging road the second time with the battery and cable. After they got the truck started they proceeded toward Mississippi with defendant following the pulpwood truck driven by Parnell Willis; that they traveled at the rate of 20 to 25 miles per hour up the Bronson Road to the Kinderbish Road, took a right on the Kinderbish Road and traveled about three-fourths of a mile and took a left on Liberty Church Road. No shots were fired on the Bronson Road or the Kinderbish Road and no state trooper was in sight on either road; that he heard no shots and did not observe any state troopers until they were about a half mile across the Mississippi line. He was still behind the logging truck when he heard a popping sound, which he at first thought was a backfire from the truck. However, he soon heard a second popping sound and realized someone was shooting at him as a bullet ripped through the rear end of his automobile and shattered the sun visor. He turned around and saw the trooper's car, but there was no red light flashing and the siren was not turned on. Defendant pulled around the logging truck and picked up speed. He also passed a pickup truck pushing an automobile. Other shots were fired at his automobile but neither he nor Hazel Robinson ever fired any shots in the direction of the state troopers.

(1) The evidence presented questions for the jury to determine and was sufficient, if believed by the jury to the requisite degree, to sustain the verdict. There was no error in denying the motion to exclude the state's evidence, nor in refusing the motion for a new trial on the grounds of the insufficiency of the evidence to support the judgment.

(2) The Court committed no error in allowing the witness King to state that the bullets shot from the woods appeared to be coming in his direction. Thacker v. State, 225 Ala. 1, 142 So. 580, and cases there cited. See also Hornsby v. Commonwealth, 305 Ky. 747, 205 S. W. 2d 338. The witness testified he had served in the armed forces and had had experience with the sound of rifles and other firearms and with hearing bullets going through the air and from this experience was able to form an opinion as to where they were coming from and the direction in which they were going.

(3) The defendant stated:

"* * * So then I pulled up and backed around and went back down there where these colored people were, and asked them, I says, 'I wonder why the Patrolman acted so peculiar.' I said, 'what was the matter with him?' They said they didn't know. I stood there and talked to them a few minuted (sic) * * *."

This conversation was properly excluded. It was a self serving statement, made after the patrolman had left the scene, when he first stopped defendant to check his driver's license and was not a part of the res gestae. Cranmore v. State, 41 Ala. App. 276, 129 So. 2d 121.

(4) Appellant's contention that it was reversible error to deny his motions to quash the venire because of the systematic exclusion of women from the grand and petit juries of Sumter County is without merit. Philpot v. State,

43 Ala. App. 326, 190 So. 2d 293. This case was tried before the legislature amended the statutes so as to provide for women serving in juries in Alabama.

We find no reversible error in the record. The judgment is affirmed.

Affirmed.

Cates, Judge (Concurring specially).

Consistently with my dissent in **Shine v. State**, Ala. App., 204 So. 2d 817, I concur in the instant case.

APPENDIX B.

Willie Gray Garrison

v.

State.

2 Div. 517.

Supreme Court of Alabama.

July 18, 1968.

Rehearing Denied Aug. 29, 1968.

Certiorari to Court of Appeals.

Geo. S. Brown and Wm. W. Smith, Birmingham, for petitioner.

MacDonald Gallion, Atty. Gen., and Robt. P. Bradley, Asst. Atty. Gen., opposed.

Lawson, Justice.

Petition of Willie Gray Garrison for certiorari to the Court of Appeals to review and revise the judgment and decision in Garrison v. State, 44 Ala. App. ..., 213 So. 2d 369.

Writ denied.

Livingston, C. J., and Merrill and Harwood, JJ., concur.

APPENDIX C.

Motion to Quash Indictment.

To the Honorable Emmett Hildreth, Judge of the Seventeenth Judicial Circuit Court of Livingston, Sumter County, Alabama:

Now comes the defendant, W. G. Garrison, and respectfully moves that this Honorable Court to quash the indictment in the above styled case returned on, to-wit, the 29th day of March, 1966 wherein Frank Stegall was the foremen (sic) and to hold the same for naught and for support of said motion alleges the following:

1. The defendant is a mele, (sic) over the age of twenty-one (21) years and was on, to-wit, the 29th day of March, 1966, a resident citizen of the State of Mississippi, and was at the time the Grand Jury of Sumter County, Alabama, returned the aforesaid indictment. Further, the State of Alabama is seeking, by this indictment, to put the defendant to trial in the Circuit Court of the Seventeenth Judicial Circuit at Livingston, Sumter County, Alabama.

2. On towit, the 2nd day of January, 1966 and prior thereto members of the female sex were and are intentionally, arbitrarily, systematically and statutorily excluded fron (sic) the Grand Juries organized in this County and State solely because of their sex and were discriminated against in the organization of Grand Juries in said County and State solely because of their sex in that no member of the female sex in (sic) included in the Jury Roll or have their names placed in the jury box and none have ever served on any Grand Jury in said County and State, thereby denying to the defendant due process and equal protection laws guaranteed him by the Fifth, Sixth and Seventh amendments and the equal protection law guar-

anteed him by the Fourteenth Amendment to the Constitution of the United States.

3. Defendant avers that no female served on the Grand Jury which returned the aforesaid indictment in this cause nor has any woman served on any Sumter County, Alabama grand Jury.

4. Defendant further avers that due to statutory exclusion in the drawing and organization of Grand Juries to serve in Sumter County, Alabama, females were totally excluded from serving on said Grand Juries and discriminated against solely due to their sex contrary to the Fifth, Sixth and Seventh Amendments and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

5. Defendant avers that at the time the Grand Jury returned the indictment in the above styled case according to the 18th Decennial Census of the United States Department of Commerce, Bureau of Census, of which the Courts of Alabama take judicial notice, the female population of Sumter County, Alabama, twenty-one (21) years and over number 5,334. Of this number within the Livingston Division of the Seventeenth Judicial Circuit of Alabama, where the defendant is to be tried, there are 5,334 female persons, twenty-one (21) years and over. Defendant avers a great majority of the aforesaid females are native born citizens of the Livingston Division of the Seventeenth Judicial Circuit of Alabama, they are householders and freeholders in said County and State, generally reputed to be honest and intelligent women, esteemed in the community for their integrity and good character, that they are not habitual drunkards nor afflicted with such disease or physical weakness as would disqualify them form (sic) discharging their duties as Grand Jurors, and that they possess all the qualifications set out in the Constitution and Laws of the State of Alabama and the United States

which govern the selection of Grand Juries, yet the jury commission failed and refused to place on the jury roll or in the jury box the names of such females (sic) citizens of Livingston, Sumter County, Alabama, and at the time of said indictment and at the present time the jury roll of said county in the Livingston Division of the Circuit Court contain no names of any females eligible under the Constitution and Laws of the State of Alabama and of the United States for jury duty in said County and State. Defendant further avers that by arbitrarily not placing the names of any females on the jury roll or in the jury box of the Livingston Division of the Seventeenth Judicial Circuit of Alabama, deprives the defendant of his rights guaranteed him by the Fifth, Sixth and Seventh Amendments and the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States.

6. Defendant avers that females are, solely because of their sex, arbitrarily, intentionally, systematically and statutorily excluded in the selection of persons for Grand Jury duty in that none of the female citizens of the Livingston Division of the Seventeenth Judicial Circuit of Alabama are included in the jury roll and their names have not been placed in the jury box, they are not listed for service, and defendant avers that the Grand Jury which returned the aforesaid indictment against him was organized according to and in keeping with Title 30, Sec. 21, Code of Alabama, recompiled 1958 wherein the Commissioners ordered to place on the jury roll and in the jury box the name of all qualified male citizens of the County, thereby depriving defendant of the due process and equal protection laws guaranteed him by the Fifth, Sixth and Seventh Amendments and the Fourteenth Amendment of the Constitution of the United States.

Wherefore, the defendant prays that this Court will take notice of this his Motion to Quash the Indictment

in the aforesaid cause, and that your honor will, after consideration of the evidence and proof which the defendant offers to make, grant said motion.

s/ W. G. Garrison.

State of Mississippi,
County of Lauderdale.

Personally appeared before me, the undersigned authority in and for the jurisdiction aforesaid, the within named W. G. Garrison, whose name is signed to the foregoing Motion and who is known to me, who upon oath deposes and says that the facts stated in said motion are true and correct, except those alleged upon information and belief as to which he says that he is informed and believes them to be true and upon such information and belief alleges that they are true and correct.

s/ W. G. Garrison.

Sworn to and subscribed before me, this 31st day of March, 1966.

s/ Mrs. Doris Edwards,
Notary Public.

My commission expires
September rth (sic) 1966.

APPENDIX D.

Motion to Quash Venire.

To the Honorable E. F. Hildreth, Judge of the Seventeenth Judicial Circuit Court of Sumter County, Alabama.

Now comes the defendant, W. G. Garrison, and respectfully moves this Honorable Court to Quash the Venire drawn on, to-wit, the 9 day of March, 1966, from which a petit jury will be struck to try the defendant's case on, to-wit, the 13 day of April, 1966, and in support of said motion alleges the following:

1. The defendant is a male.

2. Defendant avers that he was on, to-wit, the 29th day of March, 1966, a resident citizen of the State of Mississippi, over the age of (21) years, and will be tried on, to-wit, the 13 day of April, 1966 in the Circuit Court of Sumter County, Alabama.

3. Women have been fraudulently, arbitrarily, systematically and statutorily excluded from having their names placed in the jury box or put on the jury roll from which the venire was drawn on the 9 day of March, 1966 and will compose the panel that the petit jury will be selected from to try the issues in this cause.

4. Defendant avers that the 18th Decennial Census of the population of the United States, its territories and possessions for the year 1960 published by the United States Department of Commerce, Bureau of Census of Alabama take judicial notice, reflects the female population of Sumter County, Alabama, twenty-one (21) years and over number 5,334. Of this number the residents in the Seventeenth Judicial Circuit of Alabama at Sumter County, in said age group number 5,334, but in accordance with Title 30, Sec. 21, Code of Alabama, Recompiled

1958, there has been a uniform practice by the jury Commission of Sumter County, Alabama of discriminating against females solely because of their sex by not placing their names on the jury roll or not including their names in the jury box from which this venire was drawn. Defendant avers a great majority of the aforesaid females are native born citizens of the Seventeenth Judicial Circuit of Alabama at Sumter County, they are householders and freeholders in said County and State, generally reputed to be honest and intelligent women, esteemed in the community for their integrity and good character, that they are not habitual drunkards nor afflited (sic) with such disease or physical weakness as would disqualify them from discharging their duties as jurors, and that they possess all the qualifications and Law of the State of Alabama and the United States which govern the selection of jurors.

5. Defendant avers that females are, solely because of their sex fraudulently, arbitrarily, intentionally, systematically and statutorily excluded from jury service and are discriminated against in the selection of persons for jury duty in that none have been qualified to serve in the Seventeenth Judicial Circuit of Alabama at Sumter County. They are not included in the jury roll, their names are left out of the jurybox, and the defendant further avers that the venire drawn on the 9 day of March, 1966, was selected in keeping with the practice and unless this Honorable Court grants this our Motion to Quash the Venire he will be deprived of his rights by the Fifth, Sixth and Seventh Amendments to the Constitution of the United States and equal protection and due process clauses of the Fourteenth Amendment of the Constitution of the United States.

6. Defendant avers that females are, solely because of their sex, fraudulently, arbitrarily, intentionally, systematically and statutorily excluded in the selection of

persons for jury duty in that none of the female citizens of the Seventeenth Judicial Circuit of Alabama at Sumter County are included in the jury roll and their names have not been placed in the jury box, they are not listed for service and defendant avers that the venire drawn for the 9 day of March, 1966, fraudulently, arbitrarily, intentionally, systematically and statutotily (sic) excluded all females thereby depriving the defendant of the due process and equal protection laws guaranteed him by the Fifth, Sixth, Seventh and Fourteenth Amendments of the Constitution of the United States.

Wherefore premises considered, defendant prays that this Court will take notice of this his Motion to Quash the Venire in this cause and that your Honor will, after consideration of the evidence and proof which defendant offers to make, grant this Motion to Quash the Venire.

s/ W. G. Garrison.

State of Mississippi,
County of Lauderdale.

Personally appeared before me, the undersigned authority in and for the jurisdiction aforesaid, the within named W. G. Garrison, whose name is signed to the foregoing Motion and who in (sic) known to me, who upon oath deposes and says that the facts stated in said Motion are true and correct, except those alleged upon information and belief as to which he says that he is informed and believes them to be true and upon such information and belief alleges that they are true and correct.

s/ W. G. Garrison.

Sworn to and subscribed before me, this the 12th day of April, 1966.

s/ Mrs. Doris Edwards,
Notary Public.

My commission expires 9/4/66.

The foregoing motion having been presented to the Court, and is hereby set for hearing on the 13 day of April, 1966, at 9:00 A. M. in the court room of the Honorable Emmett Hildreth, Circuit Judge of the Seventeenth Judicial Circuit of Alabama.

s/ E. F. Hildreth,
Circuit Judge.

Certificate of Service.

I hereby certify that a copy of the foregoing Motion to Quash Venire has been served on the Hon. T. H. Boggs, District Attorney for the Seventeenth Judicial Circuit of Alabama, by delivering a copy of same to him at his his office in the Sumter County Courthouse, Livingston, Alabama.

This 13 day of April, 1966.

s/ Charles Tarter,
Attorney for Defendant.

(Filed this the 14 day of April, 1966, J. C. Scales, Clerk.)

(R. V-VII)

APPENDIX E.

The foregoing stipulation was entered into by and between the District Attorney on behalf of the State and Counsel for Defendant:

Stipulation.

In the above six cases, being Cases Nos. 7036, 7037, and 7035, and Cases Nos. 7038, 7039 and 7046, it is stipulated by and through attorneys representing both the State and the two above named defendants, Hon. Thomas H. Boggs, District Attorney, for the State, and Hon. Roderick Beddow, Jr., and Charles Tarter for the defendants, that the Jury Commissioners of Sumter County, Alabama, and the Clerk of the Commission, Mr. J. C. Scales, would all testify that the jury was drawn in compliance with Title 30 of the Code of Alabama, recompiled 1958, and that selection of jurors in Alabama in (sic) controlled by statute. The above stated members of the Commission were duly appointed by the Governor of the State of Alabama; that each is an elector of the county, reputed for his fairness, impartiality, integrity and good judgment, and that each of said Commissioners was appointed to serve for the tenure of the Governor in office at the time he was appointed; that they have, in fact, in the capacity as Commissioners, placed on the jury roll the names of all male citizens of the county who are generally reputed to be honest and intelligent men and esteemed in the community for their integrity, good character and sound judgment; that the Clerk of the Jury Commission, duly elected by the Commission, has obtained the names of every male citizen of the county over the age of twenty-one and under the age of sixty-five years and placed opposite their names their occupation, place of residence and place of business; further, that the jury roll contains the name of every male citizen living

in the county who possesses the qualifications above prescribed and who is not exempt by law from serving on juries; that their respective names were taken from the jury roll, printed on separate cards and placed in the jury box.

It is further stipulated that, according to the 18th Decennial Census of the United States Department of Commerce, Bureau of Census Office, and Courts of Alabama take judicial notice, that the female population of Sumter County, Alabama, twenty-one years of age and over, number 5,334.

The Defendants were indicted on March 29, 1966 and will be tried in Livingston, Sumter County, Alabama.

It is further stipulated by the parties that a great many of the aforesaid females are native born citizens of Sumter County, Alabama; that they are householders in said county and state, and a great many reputed to be honest and intelligent women, esteemed in the community for their integrity and good character; that they are not habitual drunkards nor afflicted with such disease or physical sickness as to disqualify them from discharging their duties as grand jurors, and that a great many possess all of the qualifications set out in the Constitution and laws of the State of Alabama and the United States which govern the selection of grand jurors. The parties hereto stipulate that the Commissioners and the Clerk of the Commission would further testify that no woman or female has ever been selected as a juror nor their names placed on the jury roll or in the jury box, in their respective memories, (sic) for the Circuit Court of Sumter County, Alabama, and that no females were, in fact, on the grand jury that indicted the defendants, nor are there any females on the petit jury that is to try the said defendants, and to their knowledge no female has ever sat on a grand jury or petit jury in Sumter County, Alabama.

The State of Alabama,
Sumter County.

I, Laura W. Drinkard, Official Court Reporter of the 17th Judicial Circuit of Alabama, hereby certify that the above and foregoing pages, numbered from one to three, inclusive, contain a true and correct transcription of my shorthand notes of the proceedings had on April 4th, 1966, in the Circuit Court of Sumter County, Alabama, on the hearing of Defendant's motion to quash the indictment in this case, before the Honorable Emmett F. Hildreth, Judge of said court.

Given under my hand this ... day of ..., 1966.

.....
Official Court Reporter of the 17th
Judicial Circuit of Alabama.

(R. 1-3)

SUPREME COURT, U. S.

FILED
DEC 26 1968
JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 779

WILLIE GRAY GARRISON,

Petitioner

vs.

STATE OF ALABAMA,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

MacDONALD GALLION
Attorney General

ROBERT P. BRADLEY
Assistant Attorney General
State of Alabama

Administrative Building
Montgomery, Alabama 36104

Attorneys for Respondent

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In The

Supreme Court of the United States

OCTOBER TERM, 1968

NO._____

WILLIE GRAY GARRISON,

Petitioner

vs.

STATE OF ALABAMA,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

QUESTIONS PRESENTED FOR REVIEW

Whether a defendant, indicted by and tried before State grand and petit juries from which women were by State statutes excluded, was denied his rights under the due process clauses of the Fifth and Fourteenth Amendments and of his right under the Fourteenth Amendment to the equal protection of the laws as guaranteed him by the Constitution of the United States.

Whether if the denial of these rights, which have not been previously recognized and declared, be found, the actual exercise of these newly declared rights be delayed for a reasonable time, in consideration of practical problems incident to their implementation.

ARGUMENT

In his prayer that this Honorable Court issue a writ of certiorari to review the judgment of the Court of Appeals of the State of Alabama entered in this case March 12, 1968, Petitioner relies solely on the case of *Ballard vs. United States*, 329 U.S. 187, 67 S. Ct. 261, 91 L. Ed. 181, decided by this Honorable Court December 9, 1946.

The judgment of the Court of Appeals was to the effect that the State trial court, in which Petitioner was criminally prosecuted, did not commit reversible error by denying Petitioner's motions to quash the venire because of the systematic exclusion of women from the grand and petit juries. Such exclusion was then in accord with and pursuant to State statutes. (See Appendix for statutes).

Petitioner contends that this systematic, statutory exclusion of women from the grand and petit juries operated to deny to him his rights under the due process clauses of the Fifth and Fourteenth Amendments and the equal protection clause under the Fourteenth Amendment, as guaranteed him by the Constitution of the United States.

At the outset Respondent respectfully submits that the *Ballard* case, *supra*, is inapplicable to the instant case on two grounds. First, that case was concerned only with the proper selection of Federal juries, whereas the instant case involves only State juries, and secondly, that case was concerned with the lawful method of selecting Federal juries, as prescribed by Congress and did not consider any Constitutional criterion.

The case merely determined the Congressional criterion for selecting jurors in Federal Courts as set out in the then in effect USCA §§411 and 412. These sections, in substance, provided that the qualifications for jurors in a Federal Court be the same as those set out for State jurors by the law of the State in which the Federal Court sat.

The decision went only so far as to say that where the law of the State in which a Federal Court sat did not disqualify women from State jury service, the systematic exclusion of women from Federal jury service would be ". . . a departure from the scheme of jury selection which Congress adopted . . . " (*Ballard*, 329 U.S. at p. 193).

Respondent wishes to emphasize that the *Ballard* case in no way intimated that the systematic exclusion of women even by a Federal Court sitting in a State which qualified them to serve on juries would be violative of the Constitution. [In accord see *Chance v. U. S.*, 322 F. 2d 201, CCA 5 (1963) at p. 204.] Exclusion, in such case, would be " . . . in disregard of the *prescribed standards* of jury selection." (329 U.S. at p. 195). It would " . . . deprive(s) the jury system of the broad base it was designed by *Congress* to have . . . " (329 U.S. at p. 195). It would be " . . . a departure from the *statutory scheme*." (329 U.S. at p. 195). It would be a denial to the defendant of the type of jury " . . . the *lawmakers* have not seen fit to withold from, but have actually guaranteed to him." (329 U.S. at p. 195). [Emphases added].

The Court concluded that since women had been systematically excluded from both the petit and grand juries of a Federal Court sitting in a State where they were not disqualified from State jury service, it had to dismiss the indictment rather than merely remand the cause for a new trial, for " . . . the indictment was not returned in accordance with the procedure established by *Congress*." (329 U.S. at p. 196). [Emphasis added].

In the case of *Hoyt v. Florida*, 368 U.S. 57, 82 S. Ct. 159, 7 L. Ed. 2d 118, decided by this Honorable Court November 20, 1961, Appellant, a woman, contended that her trial and conviction for second degree murder by an all male State jury violated her right to an impartial trial under the Fourteenth Amendment because the all male State jury was the operative effect of a State statute which exempted women

from State jury service unless they voluntarily registered for such. In other words, she contended that this exemption and voluntary registration procedure operationally effectuated the unconstitutional exclusion of women from the State jury, thereby rendering her trial unconstitutional.

This Honorable Court did at some length discuss the operation of this procedure to show that it was based on a reasonable classification and did not operate to the arbitrary, systematic exclusion of women from the State's juries. But, Respondent submits, this discussion was based on the supposition that the constitutionality of a State's confining its jury duties to males, was still open to question.

Prefacing this discussion the Court said:

"We need not, however, accept appellant's invitation to canvass in this case the continuing validity of this Court's dictum in *Strauder v. West Virginia*, 100 U. S. 202, 210, 25 L. Ed. 664, 666, to the effect that a State may constitutionally 'confine' jury duty 'to males.' This constitutional proposition has gone unquestioned for more than eighty years in the decisions of the Court, (citation omitted), and had been reflected, until 1957, in congressional policy respecting jury service in the federal courts themselves. *Even were it to be assumed that this question is still open to debate,* the present case tenders narrower issues." (368 U.S. at p. 60). [Emphasis added].

From this quoted portion of the *Hoyt* opinion, Respondent cannot but conclude that at least as late as November 20, 1961, when *Hoyt* was decided, this Honorable Court did not deem the confinement of State jury service by State law to men, therefore, excluding women, to be unconstitutional so as to subject an all-male State jury resulting from such confinement to attack on constitutional grounds by a defendant tried by such jury.

The latest decision of which Respondent is aware concerned with the constitutionality of State law excluding

women from State jury service was that handed down by the three judge Federal District Court in *White v. Crook*, D. C. 251 F. Supp. 401, decided February 7, 1966. The Court in *White, supra*, did find that the statutory exclusion of women by a State from State jury service did violate the Constitutional right to equal protection under the law, as guaranteed by the Fourteenth Amendment, but *of women plaintiffs who sought to assert their right and the right of all others similarly situated to sit on State juries.* The opinion did not even suggest that the exclusion would deny the Fourteenth Amendment's guarantee to a defendant tried before such a statutory all male jury.

Even with regard to the women seeking the right to sit on State juries, whose exclusion was found to be arbitrary, therefore unconstitutional, " . . . in view of modern political, social and economic conditions . . . " (251 F. Supp. at p. 408), the Court determined that public policy would be best served if such finding would be only prospective in application, and [such finding] " . . . shall have no retroactive effect." (251 F. Supp. at p. 409). The reason given for this determination was that, " . . . this Court is fully aware that the Alabama statute [which excluded women from jury lists] has been regarded and relied upon as constitutional by all alike." (251 F. Supp. at p. 409).

The Court then *specifically* declared that, for the future commencing not later than June 1, 1967, women have a right not to be excluded from jury service in Alabama courts. (251 F. Supp. at pp. 409-410).

Respondent wishes to point out that the Alabama statutes excluding women from jury service were amended September 12, 1966, in compliance with *White vs. Crook, supra.* [See Appendix A for the statutes and Appendix B for the Acts amending such]. These Acts became effective September 12, 1966, almost nine months earlier than the June 1, 1967, deadline ordered in *White vs. Crook, supra.* Petitioner's case was

tried April 13, 1966, and concluded April 15, 1966, almost five months before the amending Acts became effective.

Since there has been no holding by this Honorable Court that an all-male State jury, whether grand or petit, from which women were excluded would operate to deny to a defendant, indicted or tried by such, any Constitutional rights; Since with regard to women's rights to sit on juries in Alabama courts, Acts including them on Alabama juries and amending the statutes which excluded them were passed in compliance with the Federal District Court's order; Since Petitioner's indictment was returned and trial was had before the amending Acts went into effect, Respondent respectfully urges that Petitioner was not deprived of any Constitutional rights in the State trial court and the Judgment of the Alabama Court of Appeals is without error.

However, Respondent urges that if this Honorable Court, now, finds that a defendant, indicted and tried before all-male State grand and petit juries from which women were statutorily excluded, would be deprived of rights guaranteed him by the Fifth and Fourteenth Amendments to the Constitution of the United States, such finding be given retroactive effect in this case to a point in time not earlier than June 1, 1967. Such limited retroactive effect would recognize the State's good faith reliance on and compliance with a Federal District Court's order. Such limited retroactive effect would be consistent with *Brown vs. Board of Education,* 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873, and 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, wherein it was held that it is not uncommon for courts, when declaring constitutional rights, not previously recognized and declared, to delay for a reasonable time, in consideration of practical problems incident to an implementation of those rights, the actual exercise of the newly declared rights. [See also *Sims vs. Frink,* D.C., 208 F. Supp. 431, aff'd *Reynolds vs. Sims,* 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506.]

CONCLUSION

Based on the foregoing argument, Respondent submits that Petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

MacDONALD GALLION
Attorney General
State of Alabama

ROBERT P. BRADLEY
Assistant Attorney General
State of Alabama

Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Robert P. Bradley, one of the attorneys for respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of December 1968, I served a copy of the foregoing brief upon Honorable Roscoe B. Hogan, Attorney for Petitioner, 1203 City Federal Building, Birmingham, Alabama 35203, by depositing the same in the United States mail, first class postage prepaid, and properly addressed to him at the address given.

ROBERT P. BRADLEY
Assistant Attorney General
State of Alabama

Administrative Building
Montgomery, Alabama 36104

APPENDIX A

Title 30, §20, Code of Alabama 1940, Recompiled 1958:

"§20. The jury commission shall meet in the court house at the county seat of the several counties annually, between the first day of August and the twentieth day of December, and shall make in a well bound book a roll containing the name of every male citizen living in the county who possessed the qualifications herein prescribed and who is not exempted by law from serving on juries. The roll shall be arranged alphabetically and by precincts in their numerical order and the jury commission shall cause to be written on the roll opposite every name placed thereon the occupation, residence and place of business of every person selected, and if the residence has a street number it must be given. Upon the completion of the roll the jury commission shall cause to be prepared plain white cards all of the same size and texture and shall have written or printed on the cards the name, occupation, place of residence and place of business of the person whose name has been placed on the jury roll; writing or printing but one person's name, occupation, place of residence and of business on each card. These cards shall be placed in a substantial metal box provided with a lock and two keys, which box shall be kept in a safe or vault in the office of the probate judge, and if there be none in that office, the jury commission shall deposit it in any safe or vault in the court house to be designated on the minutes of the commission; and one of said keys thereof shall be kept by the president of the jury commission. The other of said keys shall be kept by a judge of a court of record having juries, other than probate or circuit court, and in counties having no such court then by the judge of the circuit court, for the sole use of the judges of the courts of said county needing jurors. The jury roll shall be kept securely and for the use of the jury commission exclusively. It shall not be inspected by anyone except the members of the

commission or by the clerk of the commission upon the authority of the commission, unless under an order of the judge of the circuit court or other court of record having jurisdiction."

Title 30, §21, Code of Alabama 1940, Recompiled 1958:

"§21. The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment; but no person must be selected who is under twenty-one or who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror; or cannot read English or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder his name may be placed on the jury roll and in the jury box. No person over the age of sixty-five years shall be required to serve on a jury or to remain on the panel of jurors unless he is willing to do so."

APPENDIX B

Act No. 284, Acts of Alabama, Special Session, 1966, p. 427, §1. Approved September 12, 1966:

"Section 1. In all counties in this State in which the jury board was established and its duties prescribed by a special or local law or in which the qualification of jurors or the procedure for preparation of the jury rolls and the filling and refilling of jury boxes has been prescribed by local or special law, the names of female citizens of the county, possessing like qualifications to those qualifications prescribed in such laws for male jurors shall be listed and in all things handled and treated in the same manner prescribed for the listing, handling and treating of the

names of male citizens of such counties to the end that both men and women shall be subject to jury duty under like conditions; and their names put on the jury roll and in the jury box without regard to sex."

Act No. 285, Acts of Alabama, Special Session, 1966, p. 428, §3. Approved September 12, 1966:

"Section 3. Section 20, Title 30, Code of Alabama 1940, as amended, is amended further to read as follows:

" ' Section 20. The jury commission shall meet in the court house at the county seat of the several counties annually, between the first day of August and the twentieth day of December, and shall make in a well bound book a roll containing the name of every citizen living in the county who possesses the qualifications herein prescribed and who is not exempted by law from serving on juries. The roll shall be arranged alphabetically and by precincts in their numerical order and the jury commission shall cause to be written on the roll opposite every name placed thereon the occupation, residence and place of business on each card. These cards shall be placed in a substantial metal box provided with a lock and two keys, which box shall be kept in a safe or vault in the office of the probate judge, and if there be none in that office, the jury commission shall deposit it in any safe or vault in the court house to be designated on the minutes of the commission; and one of said keys thereof shall be kept by the president of the jury commission. The other of said keys shall be kept by a judge of a court of record having juries, other than the probate or circuit court, and in counties having no such court then by the judge of the circuit court for the sole use of the judges of the courts of said county needing jurors. The jury roll shall be kept securely and for the use of the jury commission exclusively. It shall not be inspected by any one except the members of the commission or by the clerk of commission upon the authority of the commission,